New York who remans married. If this theory were applied to the case before us, the result would seem to be that Benjamin F. Olmsted was validly divorced in Michigan (though his wife in New York remained married) and that therefore his second marriage could not, even in New York, be held to be polygamous. It would seem, therefore, that the New York Court of Appeals has at last openly rejected any such absurd and indefensible doctrine,[7] and now holds that a foreign divorce is either valid as to both parties or invalid as to both parties.

H. E.

ACCIDENTAL LOSS TO REAL ESTATE OCCURRING BETWEEN CONTRACT OF SALE AND EXECUTION OF CONVEYANCE.

Where there is a contract to sell real estate, but before the conveyance has been actually executed, a loss by fire or otherwise occurs to such real estate, the question has been often raised as to which party must bear the loss, the vendor or the vendee. This question was presented to the New Jersey Court in the recent case of *Cropper* v. *Brown*, 78 Atl. 387, where the purchaser at a sheriff's sale on a *fieri facias* to foreclose a mortgage signed a contract to purchase on the conditions of sale. Before the Court confirmed the sale and a conveyance was executed, a building on the land in question was destroyed by fire and the purchaser prayed to be relieved of his bid or have the loss deducted. The Court, however, applied the doctrine of equitable conversion and held the purchaser had acquired an equitable interest in the property, so that the loss fell on him. The early English doctrine seems to have been that losses occurring between the contract of sale and execution of the conveyance fell upon the vendor. In 1724 it was stated as follows: "If I should buy a house, and before such time as by the articles I am to pay for the same the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house." [1]

The great weight of modern authority, however, is in accord with the doctrine of the principal case [2] and holds that the

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[7] The United States Supreme Court had in 1901 forced the New York Court of Appeals to reject the doctrine where the full faith and credit clause was involved (*Atherton* v. *Atherton*, 181 U. S. 155).

[1] *Stent* v. *Bailis*, 2 P. Wms. 220.

[2] *Poole* v. *Adams*, 332 J. Ch. N. S. 639; *Johnston* v. *Jones*, 12 B. Mon. 326; *Marks* v. *Tichenor*, 85 Ky. 536; *Brewer* v. *Herbert*, 30 Md. 301; *McKechine* v. *Sterling*, 48 Barb. (N. Y. 330; *Gates* v. *Smith*, 4 Ed. 702 (N. Y.); *Reed* v. *Lukens*, 44 Pa. 200; *Morgan* v. *Scott*, 26 Pa.

vendee under a contract for the sale of lands takes an equitable title to the lands, while the vendor holds the legal title in trust for the purchaser and as security for the purchase price due him. The vendee being the owner in equity of the land receives as such all benefits arising therefrom and must bear all losses. As a consequence the burning down of buildings on the premises contracted for will not relieve the vendee of his purchase nor entitle him to a reduction in the purchase price.

Where this doctrine is in force two exceptions have, however, been noted by the cases,[3] and where they apply the vendee does not have to bear the loss. The first is where there was an express contract by the vendor to deliver the land with the buildings thereon in the same situation as when the sale was made, and the other is, where the buildings were destroyed by the culpable negligence of the vendor.

The result reached is strengthened by the decision of the Courts that the vendee has an insurable interest in the premises after the contract of sale, and might have protected himself by insurance.[4]

There is, however, a class of cases following *Thompson* v. *Gould*[5] in Massachusetts, which hold that the loss falls on the vendor, applying the rules applicable to cases of personal property.[6] Wilde, J.,[7] epitomizes the underlying principles of this doctrine thus: "In respect to the loss of personal property, under like circumstances, the principle of law is perfectly clear and well established by the authorities. When there is an agreement for the sale and purchase of goods and chattels, and after the agreement and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of the destruction. No reason has been given, nor can be given, why the same principle should not be applied to real estate. The principle in no respects depends upon the nature and quality of the property and there can, therefore, be no distinction between real and personal estate."

Where, however, the subject of the sale has been mixed

51; *Ins. Co.* v. *Updegraff*, 21 Pa. 513; *Hill* v. *Co.*, 59 Pa. 474; *Oldham* v. *Kennedy*, 3 Hump. 240 (Tenn.).

[3] *Morgan* v. *Scott*, 26 Pa. 51; *Marks* v. *Tichenor* 85 Ky. 536.

[4] *McKechnie* v. *Sterling*, 48 Barb. 330; *Aetna Fire Ins. Co.* v. *Tyler*, 16 Wend. 385.

[5] 20 Pick. 134.

[6] *Gould* v. *Murch*, 70 Me. 258; *Wells* v. *Calnan*, 107 Mass. 514; *Wilson* v. *Clarke*, 60 N. H. 352.

[7] *Thompson* v. *Gould*, 20 Pick. 134.

realty and personalty, even in jurisdictions applying the doctrine of ownership in equity, the vendor, it has been held, must bear the loss and not the vendee.[8]

In the principal case the fact that the loss occurred before the confirmation of the judicial sale by the Court was not held of importance so as to relieve the vendee of the burden of the loss. That has not, however, been the uniform application of the doctrine of the vendee's liability because of ownership in equity. On a master's sale, it has been held in a New York case [9] that the buyer, in equity, becomes the owner from the day the report of the sale is confirmed, and the premises are, then, at his risk even though he has not received a deed. A loss by fire, after such confirmation and before such deed, falls upon the buyer; but the Court says, "Not so where the loss is prior to the confirmation of the report." The same rule with respect to judicial sales is in force in the English chancery.[10]

S. D. C.

Spendthrift Trusts.

Editor "University of Pennsylvania Law Review and American Law Register."

Dear Sir: The interesting note in the May number of your magazine very clearly sets forth the objections to the reasoning of the Supreme Court of Pennsylvania in the recent case of *Siegwarth's Estate,* 226 Pa. 591 (1910). The decision, however, can be sustained upon grounds which apparently did not occur to either Court or counsel.

There was a gift of the estate in trust to pay the income to the beneficiaries, and if they should die without issue, then the share was to revert back to the heirs of the testator. There is authority for the proposition that the general rule that failure of issue at the death of the first taker is to be referred to the life of the testator, is not applicable to the case where the share is given in trust, and there is a direction to pay the income to the beneficiary. The form of the gift in this case indicates an intention to give a life estate. *Estate of John Mecke,* 16 Phila. 304 (1883). If this construction is correct, the case is that of a gift in trust for life, with a vested remainder in the heirs of the testator subject to be divested by the death of the life tenant leaving issue, with discretionary power in the trustee to termi-

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[8] *Clinton* v. *Hope Ins. Co.,* 45 N. Y. 454.

[9] *Gates* v. *Smith,* 4 Edw. 702.

[10] *Ex parte Minor,* 11 Ves., Jr., 559.